William F. Adler
Executive Director
Federal Regulatory Relations

1275 Pennsylvania Avenue, N.W., Suite 400
Washington, D.C. 20004
(202) 383-6435

PACIFIC TELESIS
Group-Washington

DOCKET FILE COPY ORIGINAL

RECEIVED
NOV - 8 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 8, 1993

William F. Caton
Acting Secretary
Federal Communications Commission
Mail Stop 1170
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Dear Mr. Caton:

Re: *Gen. Docket No. 93-252 - Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*

On behalf of Pacific Bell and Nevada Bell, please find enclosed an original and six copies of their "*Comments*" in the above proceeding.

Please stamp and return the provided copy to confirm your receipt. Please contact me should you have any questions or require additional information concerning this matter.

Sincerely,

William F. Adler

Enclosures

No. of Copies rec'd 0+5
List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

COMMENTS OF PACIFIC BELL AND NEVADA BELL

JAMES P. TUTHILL
BETSY S. GRANGER

140 New Montgomery St., Rm. 1525
San Francisco, California 94105
(415) 542-7649

JAMES L. WURTZ

1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 383-6472

Their Attorneys

Date: November 8, 1993

TABLE OF CONTENTS

TABLE OF CONTENTS
(Cont'd)

PAGE

SUMMARY

The market for mobile services is competitive and is becoming more so. Therefore, in implementing the new law the Commission should impose the least amount of regulation possible in order to avoid burdening mobile services with regulatory costs and to allow consumers to benefit from competition. At the same time, it should ensure that all providers of functionally equivalent mobile services are regulated in the same manner. Specifically, we have taken the following positions:

- The statute should be applied to all mobile services.
- With respect to the definition of commercial services, the non-profit component should exempt government and non-profit safety services unless they are selling excess capacity. In addition, shared systems of users should continue to be treated as private as long as the costs are divided equally or proportionally among users.
- An expanded definition of the public switched network is necessary to recognize the revolution that has taken place in the telecommunications industry.
- Interconnection to the public switched network does not require a real-time link.
- Services even to narrow classes of users should be considered as service available to the public. The following should not determine whether a service is available to the public: system capacity; whether a service is offered indiscriminately or through individual negotiation, and service size and location.

- All SMRs should be regulated as commercial mobile service providers. Wireline common carriers should be eligible for SMR licenses.
- Commercial and private services can be allowed to exist in the same frequency band. However, they should not be provided under the same license.
- PCS services should be treated uniformly as commercial mobile services.
- Commercial service providers should not divided into classes with different regulation applied to the classes.
- Forbearance from most of the sections of Title II is appropriate because of the competitive nature of commercial mobile services.
- We agree with the Commission's proposal to preempt state regulation of the right to intrastate interconnection and the right to specify the type of interconnection. However, there is no need to preempt state regulation of interconnection rates.
- Mobile service providers should have a right to connect with each other and with the local exchange carriers.
- Equal access obligations should not be imposed on the PCS providers of mobile services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	

COMMENTS OF PACIFIC BELL AND NEVADA BELL

Pacific Bell and Nevada Bell submit the following comments in the above-captioned proceeding with respect to the regulation of commercial and private mobile services.

I. INTRODUCTION

As part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Congress amended Sections 3(n) and 332 of the Communications Act to establish a regulatory framework for mobile services.[1] The Commission has requested comment in this rulemaking on an extensive list of issues with respect to the rules that will implement this regulatory framework.[2] Because the market for mobile services is competitive and will become more so with the development of Personal Communications Services ("PCS") and the expansion of Specialized Mobile Radio services

---

[1] Pub. L. No. 103-66, Title VI, §6002(b), 107 Stat. 312, 392 (1993).

[2] In the Matter of Implementation of Sections 3(n) and 332 of the Communications Act - Regulatory Treatment of Mobile Services, GN Docket No. 93-252, Notice of Proposed Rulemaking ("NPRM"), released October 8, 1993.

("SMRs"), the Commission should impose the least amount of regulation possible in order to allow consumers to benefit from true competition and to avoid burdening mobile services with unnecessary regulatory costs. Moreover, in order to allow competition to truly flourish, the Commission must ensure that all providers of functionally equivalent mobile services are regulated in the same manner.

II. THE RULES IMPLEMENTING THE STATUTE SHOULD APPLY TO ALL MOBILE SERVICES

The Commission requests comment on whether all existing mobile services should be included within the general category of mobile services for the purposes of regulation under Section 332.[3] All mobile services (public mobile services regulated under Part 22, mobile satellite services regulated under Part 25, private land mobile services regulated under Part 90, mobile marine services regulated under Parts 80 and 87, personal radio services regulated under Part 95 and PCS services regulated under proposed Part 99) should be regulated under the new structure created by the statute because the statute does not substantively change the Act's prior definition of mobile services and does not create any other categories of mobile service other than commercial and private.[4] In keeping with the need for regulatory parity, we urge the Commission to apply the framework created by the statute to all mobile services.

---

[3] NPRM, para. 9.

[4] Budget Act, §6002(b).

III. THE DEFINITION OF COMMERCIAL MOBILE SERVICES SHOULD BE APPLIED BROADLY TO ENSURE THAT FUNCTIONALLY EQUIVALENT SERVICES ARE REGULATED IN THE SAME MANNER

As revised by the Budget Act, Section 332(d)(1) of the Communications Act describes commercial mobile service as any mobile service that is: 1) provided for profit; and 2) makes interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public. The Commission seeks comment on these components of the term "commercial mobile service."[5]

A. If A Licensee Offers Any Mobile Service On A For-profit Basis, The For-profit Test Has Been Met

The for-profit requirement exempts government and non-profit safety services from the definition of a commercial mobile service. For example, the services listed under Subpart B and Subpart C of Part 90, such as Local Government Radio Service, Police Radio Service, Fire Radio Service, Rescue organizations, Disaster Relief organizations, School Buses, would remain private.[6] Likewise, businesses that operate mobile radio systems solely for their own private internal use such as the Telephone Maintenance Radio Service or Video Production Radio Service listed in Subpart D of Part 90[7] are not commercial services. However, the for-profit test should be applied to the

---

[5] NPRM, paras. 10-27.

[6] See 47 CFR §90, Subparts B and C.

[7] See 47 CFR §90, Subpart D.

entire service. If any part of the service is for profit, the entire service should be treated as for-profit. A mobile service provider should not be able to escape a classification as commercial by claiming that it is offering that portion of the service consisting of "interconnected service" on a non-profit basis.

Licensees that operate systems for their own internal use should not be permitted to sell excess capacity on a for-profit basis and still remain private mobile service providers. Consequently, we oppose the continuation of Part 90.179, which permits shared use on a for-profit private carrier basis. We have no objection to the continuation of shared systems of eligible users under Part 90, as long as they are operated on a non-profit basis with all costs equally or proportionally divided among the users. As the Commission noted, the revised language of Section 3(n) specifically provides that private communications systems may be licensed on an individual, cooperative, or multiple basis.[8] However, any licensee that manages a shared system on a for-profit basis should be regulated as a commercial mobile service provider.

B. The Definitions Of The Public Switched Network And Interconnection Must Be Expanded

The Commission requests comment on how to define interconnected service and the Public Switched Network ("PSN").[9]

---

[8] NPRM, para. 13.

[9] NPRM, paras. 14-22.

The terms are very closely related. Pacific Bell and Nevada Bell urge the Commission to recognize that its current definition of the PSN needs to be revised. The Commission states that the current term "encompasses both wireline and wireless facilities of exchange and interexchange carriers.[10] That definition is now a vestige of telecommunications history. The industry is undergoing a revolution; new providers and new services appear almost weekly. Local and interexchange common carriers are no longer the only sources of telecommunications services. Cable companies, competitive access providers, large private networks, satellite systems, and mobile service providers offer services that are or soon will be interconnected with the traditional PSN and that are substitutes for components of the PSN. Yet, these competitors operate under a different regulatory structure. That is not right.

We believe that the PSN is comprised of all entities that:

1) make use of the numbering resources of the North American Numbering Plan in the provision of their services or,
2) have access through a gateway to or are interconnected through a gateway with call (call set-up) or non-call (roaming and/or registration) associated signalling, or
3) have access to national database services such as the 800 database.

---

[10] NPRM, para. 22 n.26.

Consequently, interconnected service occurs when an entity:

1) makes use of the numbering resources of the North American Numbering Plan in the provision of its services, or
2) has access through a gateway to signalling for call or non-call data that supports the PSN, or
3) has access to national databases that support the PSN.

The Commission should recognize the dramatic changes the industry has experienced and is going through now and adopt a definition such as we have proposed which reflects those changes.

The Commission requests comment on whether interconnection requires a real-time link.[11] It should not be relevant whether access occurs on a real-time direct basis. The critical factor should be whether or not the customer is in communication with someone on the PSN. If the customer has received the benefit of connection with the PSN, regardless of whether a time delay occurred, interconnection for the purposes of the statute occurs.

C. Public Availability Of A Service Is Met Even When A Service Is Offered To Even a Narrow Class Of Users

The Commission also requests comment on what is meant by "service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public."[12] We believe that even service to

---

[11] NPRM, para. 21.

[12] Id. at paras. 23 and 24.

narrow classes of users should be considered as service available to the public. This is in keeping with Congressional intent and the like treatment of services principle. As the Commission observed, the Conference Report stated that the word "broad" was deleted from the definition "to ensure that the definition of commercial mobile service would encompass services offered to broad or narrow classes."[13]

We also note that statutory language defines private mobile service as any mobile service that is not a commercial mobile service or the functional equivalent of a commercial mobile service.[14] Congress included this language to make certain a service that functions like a commercial service but does not fall within the literal definition of a commercial service would still be regulated like a commercial service.[15] Consequently, we believe that when a mobile service provider is offering service on a for-profit basis to a user who is not affiliated with the licensee nor a member of its affinity group,

---

[13] NPRM, para. 25, H.R. Rep. No. 102-213, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 496.

[14] Section 332(d)(3).

[15] The Commission suggests as an alternative interpretation that a service that falls within the literal definition of commercial may still be regulated as private if it was not functionally equivalent to a commercial service. However, as the Commission notes, the practical effect of such an interpretation would be to expand the potential number of services that would be classified as private. NPRM, para. 29. We do not believe Congress intended this interpretation. The Conference Report specifically states the Committee added the "functionally equivalent" language to the definition of "private mobile service" "to make clear that the term includes neither a commercial mobile service nor the functional equivalent of a commercial mobile service." Conference Report at 496.

the license should be classified as a commercial provider. This definition would continue to allow Part 90 eligibles to engage in sharing on a non-profit basis but would permit the selling of excess capacity only if the mobile service provider were regulated as a commercial provider.

The Commission requested comment on how to define functional equivalency and noted that customer perception and the nature of the services are generally the standards used.[16] Our definition takes both standards into account. A service offered on a for-profit basis to a customer outside of an affinity group looks the same to the customer regardless of whether it is available to a large or small segment of the public. Consequently, it should be regulated in the same manner as any services offered to the public on a commercial basis.

The Commission requests comment on whether any of the following should be considered in determining whether a service is available to a substantial portion of the public: system capacity;[17] whether a service is offered indiscriminately or through individual negotiation;[18] and service area size and location.[19] None of these circumstances should be a factor in determining whether a service is available to a substantial portion of the public. System capacity does not have a significant effect on public availability of the service.

---

[16] NPRM, para. 33.

[17] Id. at para. 26.

[18] Id. at para. 26 n.31.

[19] Id. at para. 27.

Traditional SMRs have limited capacity but virtually no limit on who can use the service. Likewise, whether a service is offered through individual negotiation or offered indiscriminately does not limit its availability per se. Finally, area size and location also have a limited effect on public availability. A paging service limited to a business park would serve the public in that area. The sole criterion should be the user group. If service is provided outside the user group, even if only to a narrow group, it should be considered to be available to the public. This criteria is reasonable and easy to administer.

IV. SOME EXISTING PRIVATE SERVICES WILL BECOME COMMERCIAL SERVICES UNDER THE NEW LAW

A. Existing Private, Non-commercial Mobile Services Should Remain Classified As Private

The Commission requests comment on how the new statutory requirements affect existing private services.[20] The Commission proposes to classify all existing private non-commercial services as private.[21] A non-commercial land mobile system is one that will be used only for a licensee's internal use.[22] This includes government, public safety, and non-commercial land mobile services under Part 90, private mobile marine and aviation services under Parts 80 and 87, and personal mobile radio services under Part 95. Pacific Bell and

---

[20] Id. at paras. 35-40.

[21] Id. at para. 35.

[22] 47 CFR §90.717

Nevada Bell agree with this proposal. It is consistent with our belief that truly internal uses of mobile services should be treated as private.

B. Existing Private For-profit Services Should Be Classified As Commercial

With respect to the existing for-profit services regulated under Part 90, e.g., the SMRs, the Commission requests comment on how these services should be classified.[23] It notes the service of wide-area SMRs is generally available to a substantial portion of the public and hence commercial classification would be appropriate.[24] However, the Commission asks whether SMRs that do not offer wide-area service or do not employ frequency reuse should be classified as commercial.

All mobile service providers offering for-profit service even to narrow segments of the public, should be regulated as commercial service providers except for those mobile service providers whose service is not connected to the PSN. Otherwise, mobile service providers would have an incentive to tailor services very narrowly, to obtain the benefits of reduced regulation through classification as a private mobile service provider.

---

[23] NPRM, para. 36.

[24] Id.

C. Wireline Common Carriers Should Be Eligible For SMR Licenses

Currently, wireline common carriers are prohibited from applying for licenses to operate SMRs.[25] Competition in this area is strong. In addition, once SMRs are formally classified as commercial service providers and are regulated as common carriers, there is no justification for the continuation of this prohibition. Wireline common carriers, by virtue of their customer-focused communications design, construction and operation experience, and human and financial resources, are ideally suited to provide a wide array of SMRs. The public interest would be served by allowing greater competition and removing this artificial barrier to entry. We note that the House Budget Committee Report specifically encouraged the Commission to re-examine this restriction.[26]

D. Private Paging Services Should Be Classified As Commercial

The Commission requests comment on the regulatory treatment of private carrier paging services under the new statute.[27] The Commission observes that these services are

---

[25] 47 CFR §90.609(c). This restriction is being challenged in PR Docket No. 92-235. In addition, BellSouth has filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit of the Commission's decision not to eliminate the restriction in PR Docket No. 86-3, released on October 30, 1992.

[26] H.R. Rep. No. 111, 103rd Congress, 1st Sess. 262 (1993).

[27] NPRM, para. 39.

generally provided for profit and without significant restrictions on eligibility, service area or capacity. Thus, the Commission states that classification of paging services will be determined by whether paging services provide interconnected service.[28] Consistent with our view that interconnection with the PSN occurs wherever there is access to the PSN, regardless of whether it is on a real-time basis, paging services should be classified as commercial mobile service providers.

E. Private And Commercial Services Can Exist On The Same Frequency Band But Must Be Provided Under Separate Licenses

The Commission notes that the reclassification of existing services raises the issues of whether private and commercial services can exist in the same frequency band.[29] Along the same line, the Commission requests comment on whether to classify the mobile service provider based on its primary use of the spectrum and whether licensees should have the option to provide both commercial and private service under a single license.[30] Pacific Bell and Nevada Bell have no objection to having private and commercial services exist on the same frequency band. However, commercial and private service should not be provided under the same license. It would be an administrative nightmare to police mixed use and to make certain

---

28 Id.

29 Id. at para. 40.

30 Id.

that the proper portion was regulated appropriately. Likewise, licensees should not be classified as commercial or private based on the primary use of the license. That alternative would invite service manipulation to obtain private classification and would be difficult to police. Commercial services and private services should be licensed separately. A mobile service provider offering any commercial service should be classified and regulated as a commercial service provider.

V. ALL PCS SERVICES SHOULD BE REGULATED AS COMMERCIAL SERVICES

The Commission requests comment on whether PCS should be uniformly treated as a commercial mobile service or whether there are also potential applications of PCS that would constitute private mobile service.[31]

The four objectives of the Commission in providing a regulatory structure for PCS are: universality, speed of deployment, diversity of services, and competitive delivery.[32] The Commission also stated that it believed that "2 GHz PCS will be a highly competitive service,"[33] and it imposed stringent build-out requirements on PCS licensees.

---

[31] Id. at para. 26.

[32] In the Matter of the Commission's Rules to Establish New Personal Communications Service, Gen. Docket No. 90-314, RM-7140, RM-7175, RM-7618, Second Report and Order, released October 22, 1993, para. 5 ("PCS Second Report and Order").

[33] Id. at para. 134.

Unlike build-out requirements for private services which are designed to ensure the spectrum is used,[34] PCS build-out requirements are aimed at promoting widespread availability of service. PCS licensees must offer services to one-third of the population in each market area within five years, two-thirds within seven years, and 90 percent within 10 years of being licensed. Failure to meet this requirement will result in forfeiture of the license and the licensee will be ineligible to regain it.[35]

While we appreciate the Commission's desire to take a flexible approach, a private licensed PCS service would not be consistent with the Commission's goal of universality of service. In addition, it is unlikely that a PCS auction bidder interested in a truly private service offering would value even a 10 MHz license enough to make a winning bid. Consequently, Pacific Bell and Nevada Bell believe that all licensed PCS services should be regulated as commercial services. This result will ensure that functionally equivalent services are regulated in the same manner.

VI. THERE IS NO JUSTIFICATION FOR DIFFERENTIAL TREATMENT OF COMMERCIAL MOBILE SERVICE PROVIDERS

The Commission notes that the Conference Report permits but does not require differential treatment of

---

[34] In the Request of Mobile Data Communications, Inc. For Waiver and Other Relief to Enable the Construction of a Nationwide Two-Way Data Communications Network, 4 FCC Rcd 3802, 3805 (1989).

[35] PCS Second Report and Order, para. 134.

commercial service providers.[36] The Commission, therefore, tentatively concludes that it is authorized to establish classes or categories of commercial service providers and to promulgate regulations that vary among such classes.[37] The Commission proposes to create three classes: common carrier mobile services, certain PCS services, and certain private mobile services.[38]

Pacific Bell and Nevada Bell strongly oppose the division of commercial mobile service providers into different classes with different regulatory treatment for each class. Commercial mobile services are very competitive. With the licensing of PCS, any given area will have two cellular providers, up to seven PCS providers, and one or more SMRs. All of the entities should be allowed to compete on a level playing field. There is no evidence that different providers require different regulatory treatment at this time.

Congress gave the Commission the flexibility to impose different regulatory treatment if market conditions justify it. An equal regulatory structure should be the starting point. If market conditions point to the need for different classes of regulation after the mobile service providers have been allowed to compete, then the Commission should consider the need for different regulatory treatment at that time. While the market is still in the developmental stage with a variety of

---

[36] NPRM, para. 53.

[37] Id. at para. 54.

[38] Id. at para. 55.

competitive choices, there is no justification for handicapping certain providers with greater regulatory burdens from the start.

VII. FORBEARANCE FROM APPLYING MOST SECTIONS OF TITLE II IS APPROPRIATE BECAUSE MOBILE SERVICES ARE COMPETITIVE

The Commission is required to apply the provisions of Sections 201, 202 and 208 to commercial service providers.[39] However, it may forbear from applying any other section of Title II if it determines:

-- enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

-- enforcement of such provision is not necessary for the protection of consumers; and

-- specifying such provision is consistent with the public interest.[40]

As part of evaluating the public interest, Congress has mandated that the Commission consider "whether the proposed regulation...will promote competitive market conditions, including the extent to which such regulation...will enhance competition among providers of commercial mobile services...."[41]

---

39 Section 332(c)(1)(A) of the Communications Act.

40 Id.

41 Section 332(c)(1)(C).

The Commission's tentative conclusion is that the level of competition in the commercial mobile services marketplace is sufficient to permit the Commission to forbear from tariff regulation of the rates for commercial mobile services provided to end users. Pacific Bell and Nevada Bell agree. Because of the competitive nature of these services, Pacific Bell and Nevada Bell believe application of the following sections is also unnecessary: Sections 203, 204, 205, 210, 211, 212, 213, 214, 215, 218, 219, 220 and 221. Sections 207, 208 and 209 relate to the complaint remedy in Section 208 from which the Commission may not forbear. Consequently, we agree with the Commission's tentative conclusion that forbearance with respect to these sections would not be in the public interest.

The Commission also requests comment on whether it should impose any specific requirements on dominant common carriers with commercial mobile service affiliates.[42] In the footnote it refers to cost accounting.[43] Although the requirements are directed to the dominant common carrier, the result of the requirements is often a handicap on a non-dominant affiliate. Given the competitive nature of commercial mobile services, there is no need to handicap one segment of providers --- those affiliated with dominant common carriers just because of the affiliation. We note in the PCS Second Report and Order

---

[42] NPRM, para. 64.

[43] Id. at para. 64 n.85.

the Commission rejected the imposition of additional cost accounting rules on LECs that provide PCS service.[44]

VIII. INTERCONNECTION RIGHTS ESTABLISHED UNDER THE NEW LAW SHOULD BE CONSISTENT WITH INTERCONNECTION RIGHTS ESTABLISHED UNDER PART 22

The Commission proposes preempting state regulation of the right to intrastate interconnection and the right to specify the type of interconnection because it concludes that separate interconnection arrangements for interstate and intrastate services are not feasible and are thus inseverable.[45] The Commission made a similar finding with respect to interconnection under Part 22[46] and sees no distinction between previously established interconnection rights for Part 22 licensees and those of commercial service providers. Pacific Bell and Nevada Bell agree that the provision of interstate and intrastate interconnection and the type of interconnection are inseverable and therefore support the Commission's proposal.

The Commission also requests comment regarding state preemption of interconnection rates.[47] Pacific Bell and Nevada Bell do not believe that there is a need to preempt state regulation of the rates for interconnection at this time. However, we agree that the Commission should reserve the right

---

[44] Second PCS Report and Order, para. 126.

[45] NPRM, para. 71.

[46] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, 2 FCC Rcd 2910 (1987).

[47] NPRM, para. 75.

to consider preemption if state and local regulation is exercised in such a way as to thwart the development of interstate mobile services. As PCS services are just beginning, we urge the Commission to pay particular attention to any state regulation of interconnection rates that would set the rates so high as to preclude the development of interstate PCS services.

The Commission also seeks comment on whether to require commercial mobile service providers to provide interconnection to other mobile service providers.[48] Pacific Bell and Nevada Bell strongly support a right to interconnection between commercial mobile service providers and between commercial service providers and the LECs to enable the ubiquitous origination and termination of telecommunications. We are not, however, advocating "expanded interconnection," i.e., physical or virtual collocation.

Commercial mobile service providers are designated common carriers by the Budget Act and are specifically subject to Section 201.[49] Section 201 requires interconnection when the Commission determines that interconnection is in the public interest.[50] Interconnectivity of mobile communications services is in the public interest. One of the goals of the Commission in providing for the regulation of PCS is the universality of service.[51] Interconnection will promote this

---

48 Id. at para. 71.

49 Section 332(C)(1).

50 47 USC §201(a).

51 PCS Second Report and Order, para. 5.